

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROSE L. JOHNSON
Claimant

VS.

HILLCREST MANOR
Respondent

AND

NATIONAL UNION FIRE INS. CO.
Insurance Carrier

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Docket No. 217,751

ORDER

Respondent and claimant both appealed Administrative Law Judge John D. Clark's February 19, 1998, Award. The Appeals Board heard oral argument on September 23, 1998, by telephone conference.

APPEARANCES

The claimant appeared by her attorney, James S. Oswalt of Hutchinson, Kansas. The respondent and its insurance carrier appeared by their attorney, Stephen P. Doherty of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award. In addition, at oral argument, the parties agreed the Discovery Deposition of claimant taken on July 14, 1997, is part of the record.

ISSUES

The respondent appealed from the Administrative Law Judge's 77 percent work disability award. First, respondent contends claimant is not entitled to permanent disability benefits because she unreasonably refused to accept surgical treatment for her left knee injury. Second, the respondent contends claimant is not entitled to a work disability because the injury claimant suffered in the work-related accident on July 28, 1995, is only to her left knee. Accordingly, the respondent contends claimant's permanent partial

disability benefits are limited to the loss of use of the left lower extremity which is a scheduled injury found at K.S.A. 44-510d(a)(16). Third, respondent contends the Administrative Law Judge erred when he used the independent medical examination physician's opinion on causation contained in the report without the physician's supporting testimony. Fourth, the respondent contends the temporary total disability weekly compensation rate of \$250.41 was stipulated to by the parties and the Administrative Law Judge erred when he used \$271.80 as the temporary total disability weekly compensation rate in computing the award. Fifth, respondent contends claimant is not entitled to the unauthorized medical expense for chiropractor Dr. Paul E. Sommer's medical bill because he treated a condition not related to the work-related accident. Lastly, the respondent contends, in the event the Appeals Board finds claimant is entitled to a work disability, the record proves claimant is entitled to a much lower task loss and wage loss resulting in a much lower work disability award.

In contrast, claimant agrees with the work disability award but contends the Administrative Law Judge erred when he reduced the award by the weekly amount of claimant's social security retirement benefits. The claimant contends, since the claimant was receiving social security retirement benefits on the date of her injury, that the offset statute found at K.S.A. 44-501(h) does not apply.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Findings of Fact

- (1) On the date of claimant's accident, July 28, 1995, claimant was a licensed practical nurse working for respondent as the night shift supervisor.
- (2) Claimant fell and fractured her left knee cap or patella as she entered a patient's room while she was carrying a tray with a water pitcher and glass.
- (3) Respondent provided medical treatment for claimant's injuries primarily through orthopedic surgeon V. C. Patel, M.D., of Independence, Kansas. Dr. Patel placed claimant in a cast and confined her to bed at home for approximately six weeks. Dr. Patel then placed claimant in a rehabilitation and physical therapy program.
- (4) In February 1996, Dr. Patel released claimant to return to work for four hours per day with no twisting of the knee or lifting patients.
- (5) Claimant returned to respondent with those restrictions and respondent did not offer claimant accommodated employment.

(6) On the date of the regular hearing, July 23, 1997, claimant was not employed and had not actively looked for work since her July 28, 1995, accident.

(7) Claimant was 69 years of age on the date of her work-related accident and had been receiving social security retirement benefits since she was 65 years of age in the amount of \$525 per month.

(8) Dr. Patel found claimant's left knee to be unstable and diagnosed a torn meniscus. Dr. Patel suggested surgery to repair the torn meniscus.

(9) Claimant decided not to have the recommended surgery. Claimant previously had an angioplasty procedure which entered the femoral artery through her left thigh. Claimant expressed concern for the surgery because a tourniquet would be applied to her left thigh during the surgery. Claimant testified Dr. Patel and Dr. James Joseph, Jr., an orthopedic surgeon who later treated claimant, both stated they did not blame her for refusing the surgery.

(10) Claimant testified her low back was symptomatic immediately after the July 28, 1995, accident. She claimed she had pain and discomfort in her back while she was confined to bed for six weeks. The back symptoms worsened as she was in rehabilitation and as she increased ambulation. Claimant testified at the July 23, 1997, regular hearing, her back remained symptomatic.

(11) Respondent's insurance carrier referred claimant to orthopedic surgeon James Joseph, Jr., M.D., located in Wichita, Kansas. Dr. Joseph saw claimant on two occasions, April 18, 1996, and May 6, 1996. Dr. Joseph found a healed fractured left patella without additional problems. However, after the patella healed, the doctor found claimant had developed pain on the medial side of her left knee, separate from the patella injury. Dr. Joseph testified when he treated claimant she did not complain of back pain and he did not observe her walking with an altered gait. The doctor diagnosed a left arthritic knee with a degenerative torn meniscus. He did not directly relate those conditions to the July 28, 1995, accident. Dr. Joseph released claimant with no restrictions, except for limiting herself. The doctor was not asked to express an opinion in reference to claimant's permanent functional impairment.

(12) Claimant also was seen, at two different periods of time, by chiropractor, Dr. Paul E. Sommer. Dr. Sommer treated claimant's left knee for pain and weakness related to the torn meniscus in May and June 1996.

Dr. Sommer saw claimant again in April 1997 for left hip and low back pain. The doctor testified the left hip and sacroiliac joint pain were the result of her favoring the left knee. After some five treatments, Dr. Sommer testified claimant made some improvement.

(13) At the request of claimant's attorney, claimant was evaluated and examined by C. Reiff Brown, M.D., an orthopedic surgeon located in Great Bend, Kansas. Dr. Brown saw claimant once on November 4, 1996. The doctor had the benefit of claimant's medical treatment records of Drs. Patel, Joseph, and Sommer. Dr. Brown took a history from claimant and conducted a physical examination.

The doctor found claimant's left patella fracture had healed nicely. He noted, however, claimant walked with a mild antalgic limp. He diagnosed some chondromalacia present, the result of early traumatic arthritic changes. She had some residual loss of strength of the quadriceps muscle on the left. He also found probable internal derangement of the left knee which he felt represented a cartilage tear.

Dr. Brown found claimant had degenerative arthritis in the lumbar spine which had preexisted the July 28, 1995, accident. The antalgic limp had caused this arthritic condition to become symptomatic. The doctor testified that arthroscopic surgery would improve the left knee pain and the antalgic gait. He noted that claimant expressed no interest in the surgery because of a prior health condition.

(14) In accordance with the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), Dr. Brown opined claimant's July 28, 1995, work-related injury had resulted in a 26 percent functional impairment of the left lower extremity. Further, the doctor opined the antalgic limp had caused claimant preexisting degenerative arthritis condition of the lumbar spine to become symptomatic resulting in a 12 percent whole body permanent functional impairment with 5 percent preexisting for the degenerative arthritic condition. Utilizing the combined valued tables of the AMA Guides, the doctor combined the lower extremity impairment with the increased low-back impairment resulting in a 16 percent whole body functional impairment.

(15) Dr. Brown placed the following permanent restrictions on claimant because of her lower extremity injury:

- (a) Avoid being on her feet for more than short periods;
- (b) Maintain a forward position of her left knee in order to avoid buckling;
- (c) No squatting; and
- (d) Minimal stair climbing.

In regard to claimant's lumbar spine, the doctor placed the following permanent restrictions:

- (a) Avoid frequent bending;

- (b) Avoid working in a flex position more than a few minutes;
- (c) Lifting occasionally limited to 25-30 pounds;
- (d) Lifting frequently limited to 20 pounds; and
- (e) All lifting done with proper body mechanics.

(16) Vocational expert Jerry Hardin had claimant complete a general information form and personally interviewed claimant in reference to the job tasks she performed in the 15 years preceding the July 28, 1995, accident.

Mr. Hardin then completed a job task list for each job claimant had performed in this 15-year period. Utilizing Dr. Brown's permanent restrictions, Mr. Hardin testified claimant had lost 54 percent of her job task performing ability as a result of her work-related injury.

(17) Dr. Brown reviewed the job task list completed by Mr. Hardin and opined, based on claimant's permanent work restrictions, she could no longer perform 54 percent of those job tasks.

(18) Administrative Law Judge appointed Phillip R. Mills, M.D., to conduct an independent medical examination of claimant. Dr. Mills is board certified in physical medicine. He saw claimant once on April 15, 1997. The doctor also was supplied with claimant's previous medical treatment records and the independent medical evaluation report completed by C. Reiff Brown, M.D. Respondent's attorney and claimant's attorney submitted a joint letter to Dr. Mills which contained seven questions for the doctor to answer following his examination of claimant.

(19) Dr. Mills' diagnosis was back sprain and fractured patella with contusion. Based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, the doctor found claimant with a 7 percent permanent functional impairment of the left lower extremity. He did not believe claimant's refusal to have arthroscopic surgery contributed to her functional impairment. The doctor opined claimant's altered gait was secondary to the July 28, 1995, work-related accident. Further, he believed claimant's preexisting arthritic changes in her lumbar spine predisposed her to injury and the work-related accident directly or her altered gait indirectly was the reason her back was symptomatic. However, the doctor reported, any functional impairment as a result of the symptomatic back, was included in the 7 percent lower extremity functional impairment rating. The doctor recommended restricting claimant to limited stair climbing only rarely with rails, no ladder climbing, no kneeling, avoid twisting or pivoting on the left knee, and not to carry or lift.

(20) The parties stipulated that claimant's pre-injury average weekly wage was \$407.69 and that claimant had been paid 48.42 weeks of temporary total disability compensation at the rate of \$250.41 per week or \$12,127.02.

Conclusions of Law

(1) The Administrative Law Judge may appoint a physician to conduct an independent medical examination of the claimant to express an opinion on claimant's injury or claimant's permanent functional impairment. See K.S.A. 44-516 and K.S.A. 44-510e(a).

The independent medical examination physician's written report shall be made a part of the record of the hearing subject to the cross-examination of either party. K.A.R. 51-9-6.

(2) The Administrative Law Judge's order appointing Dr. Mills to conduct an independent medical examination does not specify whether he did so pursuant to K.S.A. 44-510e(a) or K.S.A. 44-516. However, the Administrative Law Judge does state in the award that Dr. Mills' report was admitted pursuant to K.A.R. 51-9-6. Additionally, the parties' attorneys submitted a letter to Dr. Mills which contained questions for him to answer concerning his opinion not only on functional impairment but also on the cause of claimant's low-back symptoms.

The Appeals Board concludes all of Dr. Mills' opinions contained in his independent medical examination report dated April 15, 1997, are admissible. The respondent's attorney and the claimant's attorney jointly requested Dr. Mills to express opinions on issues other than permanent functional impairment. If respondent disagreed with Dr. Mills' opinions, the respondent had the opportunity to cross-examine Dr. Mills by deposition and failed to do so.

(3) An unreasonable refusal of the injured employee to submit to medical or surgical treatment, where the danger to life would be small and the probabilities of permanent cure great, will justify denial or termination of compensation. K.A.R. 51-9-5. The Appeals Board concludes claimant's refusal to have surgery performed on her left knee was not unreasonable. This conclusion is supported by the record, taking into consideration claimant was 69 years of age on the date of her injury, that she had a previous angioplasty procedure in the left femoral artery where the tourniquet would be applied during surgery, and the record contains no evidence the surgery would permanently eliminate the pain in the left knee or eliminate the altered gait.

(4) When a primary injury under the Workers Compensation Act arises out of and in the course of the worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury. Gillig v. Cities Service Gas Co., 222 Kan. 369, 372, 564 P.2d 548 (1977).

(5) The Appeals Board finds claimant's testimony, Dr. Mills' independent medical examination report, and Dr. Brown's testimony support the conclusion that claimant's preexisting degenerative arthritic lumbosacral spine was either aggravated by the July 28, 1995, work-related injury or became symptomatic by the altered gait directly related to the left knee injury. Accordingly, the Appeals Board concludes claimant is entitled to permanent partial disability benefits based on a work disability.

(6) K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

(7) However, K.S.A. 44-510e(a) limits the award to functional impairment so long as the claimant earns a wage equal to 90 percent or more of the pre-injury average weekly wage.

(8) If claimant unreasonably refuses to accept or even attempt to perform offered accommodated work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

(9) Even if accommodated work is not offered, claimant still must show she made a good faith effort to find employment. If claimant did not make a good faith effort, a wage will be imputed to the claimant based on the evidence the record has to claimant's earning ability. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(10) The loss of claimant's job task performing ability has to be expressed in the opinion of a physician. Dr. Brown was the only physician who testified in regard to this component of the work disability test. After reviewing the job task list completed by vocational expert Jerry Hardin, Dr. Brown concluded claimant had lost 54 percent of her job task performing ability.

(11) Both the claimant and the respondent recognized the job task list compiled by Mr. Hardin contained a number of duplicative job tasks. The Appeals Board concludes those duplicative job tasks should be eliminated. If these are eliminated, the total of the 44 job tasks listed is reduced to 15. During Dr. Brown's testimony, he identified 7 of the 15 non-duplicated job tasks that claimant retained the ability to perform as follows: answering the phone, administering medication, ordering medication, ordering supplies, charting,

supervising employees, and greeting families. Dr. Brown then identified the remaining 8 non-duplicated job tasks as tasks claimant no longer had the ability to perform as follows: lifting, pulling, walking, and rolling patients; working at patient's bedside; folding laundry; taking vital signs; changing beds; bathing patients; working with critical ill patients; and helping with C.P.R. Therefore, the Appeals Board concludes claimant's loss of job task performing ability is 53 percent.

(12) The Appeals Board finds the record supports the conclusion that claimant has not worked since the July 28, 1995, work-related accident and has not made a good faith effort to find appropriate employment. Accordingly, the Appeals Board concludes claimant has the ability to perform and find work at 40 hours per week paying at least the minimum wage of \$5.15 per hour or \$206 per week. When claimant's pre-injury stipulated average weekly wage of \$407.69 is compared with the imputed \$206 post-injury wage, claimant's wage loss is 49 percent.

(13) Therefore, the Appeals Board concludes claimant has lost 53 percent of her task performing ability and the difference in her pre-injury wage and her ability to earn post-injury wage is 49 percent. The Appeals Board concludes claimant is entitled to a 51 percent work disability.

(14) The respondent stipulated to claimant's pre-injury average weekly wage of \$407.69. Respondent also stipulated claimant was paid 48.42 weeks of temporary total disability benefits at the weekly rate of \$250.41. The Appeals Board concludes, based on claimant's average weekly wage of \$407.69, the correct weekly compensation rate is \$271.80. Accordingly, the Administrative Law Judge was correct in computing the award to reflect the correct \$271.80 compensation rate for the payment of the temporary total disability compensation weeks.

(15) K.S.A. 44-501(h) provides for an injured worker's compensation benefit payments to be reduced by the weekly amount of social security retirement benefits the claimant is receiving. The claimant argues this social security retirement offset does not apply in this case because the claimant was already receiving social security benefits on the date of her injury.

The Appeals Board concludes the statute is clear and unambiguous and the social security retirement offset applies whether claimant was receiving social security retirement benefits before the date of her injury or after the date of her injury. Therefore, claimant's weekly compensation rate of \$271.80 will be offset by claimant's weekly social security benefits of \$121.15 per week.

The Appeals Board concludes the social security offset does not apply to temporary total disability payments. The Appeals Board acknowledges K.S.A. 44-501(h) provides for "any compensation benefit payments" to be offset by social security retirement benefits.

However, the Appeals Board finds, because temporary total disability compensation is a temporary wage replacement benefit and the statute limits the offset to a minimum benefit based on permanent functional impairment, the legislature's intent was to only offset permanent disability benefits and not temporary benefits.

(16) The Appeals Board concludes claimant is entitled to unauthorized medical expense for chiropractor Dr. Sommer's bill in the amount of \$180. Dr. Sommer treated claimant's injured left knee and the Appeals Board disagrees with respondent's argument that the torn meniscus had no relationship to the July 28, 1995, accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated February 19, 1998, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rose L. Johnson, and against the respondent, Hillcrest Manor, and its insurance carrier, National Union Fire Insurance Company, for an accidental injury sustained on July 28, 1995, and based upon an average weekly wage of \$407.69.

Claimant is entitled to 48.42 weeks of temporary total disability compensation at the rate of \$271.80 per week or \$13,160.56, followed by 194.61 weeks of permanent partial disability compensation at the reduced rate of \$150.65 per week or \$29,318.00, for a 51% permanent partial general disability, making a total award of \$42,478.56.

As of November 20, 1998, there is due and owing claimant 48.42 weeks of temporary total disability compensation at the rate of \$271.80 per week or \$13,160.56, followed by 124.58 weeks of permanent partial compensation at the reduced rate of \$150.65 per week in the sum of \$18,767.98 for a total of \$31,928.54, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$10,550.02 is to be paid for 70.03 weeks at the rate of \$150.65 per week until fully paid or further order of the Director.

Claimant is entitled to the unauthorized medical expense up to the statutory maximum of \$500.

All authorized medical expenses are ordered paid by the respondent.

Claimant is entitled to future medical treatment upon proper application and approval by the Director.

All remaining orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of November 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Oswalt, Hutchinson, KS
Stephen P. Doherty, Kansas City, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director